IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285 (RCL)
(Judge Lamberth)

INTERIOR DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL TESTIMONY OF DONNA ERWIN

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") submit the following memorandum of points and authorities in opposition to "Plaintiffs' Motion To Compel Testimony Of Donna Erwin Who Was Impermissibly Directed By Defendants' Counsel Not To Answer Questions On The Basis of Attorney Client Privilege And Harassment And Request For Sanctions Pursuant To Rule 37(4)(A) [sic]." ("Plaintiffs' Motion").

SUMMARY OF ARGUMENT

This Court should deny Plaintiffs' motion to compel Ms. Erwin's testimony because the testimony sought (1) would reveal privileged attorney-client communications; and (2) is not within the scope of discovery for which the deposition was ordered. Plaintiffs' irrelevant and harassing deposition questioning, in which Plaintiffs' counsel repeatedly asked Ms. Erwin questions intended to cause her to reveal attorney client communications, strayed away from any proper purpose in noticing the

deposition, i.e., discovery regarding the January 6, 2003 plans ("January 6 Plans"). Their motion constitutes yet another unwarranted attack on the individuals working on trust reform as well as on Government counsel. Further, Plaintiffs' request for sanctions pursuant to Rule 37(a)(4)(A) should be rejected because the assertions of privilege were substantially justified.

BACKGROUND

On December 9, 2002, Plaintiffs noticed the deposition of Donna Erwin, Acting Special Trustee and Bert Edwards, Director, Office of Historical Trust Accounting. Interior Defendants promptly moved for a protective order and on December 13, 2002, this Court held a hearing. Plaintiffs stated both prior to and during the hearing that they needed to depose Ms. Erwin and Mr. Edwards prior to January 6, 2003 in order to obtain discovery for preparation of their "accounting" plan.[1] December 13, 2002 Hearing Transcript ("Dec. 13 Hearing Tr.") at 11; Report and Recommendation of the Special Master-Monitor dated December 12, 2002 at 4 (recounting Plaintiffs' counsel's argument from the discovery conference). Interior Defendants did not oppose the depositions, but argued that having them scheduled prior to January 6 would interfere with preparation of the Department of Interior's January 6 Plans. Dec 13 Hearing Tr. at 7. During the hearing, in addition to other arguments in favor of a protective order, Government counsel argued that having the deposition noticed for Washington, D.C., meant that Ms. Erwin, whose office is in Albuquerque, New Mexico, would be taken away from work for four days – two days of round-trip travel, one day of preparation, and one

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[1] Despite Plaintiffs' representations, the contents of Plaintiffs' plans give no indication why it was necessary to take Ms. Erwin's deposition prior to January 6, 2003.

day for the deposition itself. Id. at 12-13. In response to questions by the Court, Government counsel stated that it was his understanding that Ms. Erwin was planning a family trip to Florida during the holidays but that it was his understanding that she did not plan to be in Washington, D.C., prior to January 6. Id. at 13-14. The Court denied Interior Defendants' Motion For Protective Order, but ordered that Ms. Erwin's deposition be scheduled to take place in Albuquerque. Id. at 14.

On Monday, December 16, 2002, Plaintiffs' counsel learned that Ms. Erwin was scheduled to travel to Washington, D.C., that same day in order to attend a Tribal Task Force Meeting scheduled to take place that day and the next day, Tuesday, December 17th. Ms. Erwin did arrive in Washington, D.C., on the afternoon of December 16th. On December 17, 2002, at Plaintiffs' request, this Court held another hearing concerning the scheduling of Ms. Erwin's deposition. Plaintiffs requested that they be permitted to take Ms. Erwin's deposition in Washington, D.C., citing Ms. Erwin's presence here. December 17, 2002 Hearing Transcript ("Dec. 17 Hearing Tr.") at 4. During the December 17 hearing, Government counsel stated that on December 13, he had no indication that Ms. Erwin was going to be traveling to Washington, D.C. Id. at 9. He explained that, although he had not been aware of it, Ms. Erwin initially made plans to travel to the Tribal Task Force meeting prior to receiving notice of the deposition. Id. Government counsel further explained that Ms. Erwin, upon learning of the notice of the deposition, decided to postpone a decision on travel to Washington, D.C. until the question of her noticed deposition appearance could be resolved. Id. at 10. Government counsel stated that Ms. Erwin's thinking was that if the deposition was to be scheduled in Washington, D.C., then she would not travel to Washington, D.C., for the Tribal Task Force meeting; however, if the deposition were

postponed or scheduled for Albuquerque, then she would to travel to Washington, D.C., to attend the meeting. Id. at 9-10. In response to this explanation, the Court asked, "it's a deliberate attempt to deceive the Court, isn't it?" Id. at 12. Government counsel answered that there was no deliberate attempt by Ms. Erwin to mislead the Court. Id. at 13. Government counsel had explained earlier in the hearing that the confusion resulted because Ms. Erwin's plan apparently was a contingent one, i.e., that she would make her decision to travel to Washington, D.C., based on the outcome of the hearing and that prior to the hearing, her travel plans were up in the air. Id. at 9-10. The Court ultimately amended its previous order and ordered that Ms. Erwin be deposed in Washington, D.C., on Friday, December 20.

Plaintiffs' counsel deposed Ms. Erwin on December 20. Just before the end of the agreed upon time for the deposition, aware that Ms. Erwin had to leave to catch her plane, and inconsistent with prior representations to the Court that Plaintiffs needed to depose Ms. Erwin prior to January 6 for the purpose of obtaining information for their January 6 Plans, Plaintiffs' counsel launched into wholly irrelevant questions concerning the scheduling of Ms. Erwin's deposition. The following colloquy occurred:

Mr. Brown: You were present in Court on December 17 at a hearing, do you remember that hearing?

Ms. Erwin: Yes.

Mr. Brown: As you left the Court you said something to the effect that I'm not going to take this anymore. What were you referring to?

Ms. Erwin: Concerns regarding the outcome of the hearing.

Mr. Brown: Can you explain that a little more? Let the record reflect there's a conference between counsel and client.

(Off the record.)

Ms. Erwin: I felt that the Court had perceived that I had been less than truthful and felt that was not an accurate depiction.

Mr. Brown: Because you had been fully truthful with your attorneys?

Government counsel: You can answer that.

Ms. Erwin: Yes.

Mr. Brown: And you believe your attorneys have been fully truthful with the Court?

Government counsel: I'm going to object on that on the grounds that it's protected by the attorney-client privilege.

Erwin Dep. Tr. at 283-84.

Plaintiffs' counsel continued repeatedly to ask multiple variations of the same question, plainly attempting to elicit what Ms. Erwin told Government counsel.[2] Id. at 286, 291, 294-95, and 295-96.

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[2] Plaintiffs' counsel repeated the question several times in various forms:

Q You've sat in that courtroom. You heard what was represented to the Court by your attorneys. Were those representations accurate? Erwin Dep. Tr. at 286.

Q Do you believe the Justice Department made misrepresentations in Court in the hearing you attended in anything they said? Id. at 291.

Q Do you believe the Justice Department counsel made misrepresentations concerning your availability to come to Washington, D.C.? Id. at 291.

Q Did the Department of Justice make a misrepresentation to the Court, in your opinion, based upon what you heard in Court, when you were present on the 17th? . . . As to your availability for deposition in Washington, D.C.? Id. at 294-95.

Government counsel objected and instructed Ms. Erwin not to answer based on the attorney-client privilege. Id. Plaintiffs' counsel engaged in what can only be viewed as an attempt to harass Ms. Erwin by repeatedly asking her the same irrelevant question after she was instructed not to answer by counsel. Id. Plaintiffs' counsel also appears to have deliberately waited until the end of Ms. Erwin's deposition, with her departure by plane imminent, in order to further harass the witness. Indeed, had Plaintiffs chosen to attempt this line of questioning earlier in the day, it may have been resolved before the witness had to leave.

Plaintiffs' counsel also engaged in what can reasonably be viewed as an attempt to intimidate Ms. Erwin into answering the questions, by making the unfounded accusation that Ms. Erwin was being coached, by asking her to answer the question in her "personal" capacity, and by asking her if she had obtained private counsel, even though her deposition had been noticed solely as to her official capacity. Erwin Dep. Tr. at 288-289, 293. Following the harassment by Plaintiffs' counsel, Ms. Erwin was visibly and understandably upset. Id. at 296.

Despite the fact that the deposition was limited in scope to the January 6 Plans and Ms. Erwin appeared for and answered questions concerning the same, Plaintiffs nevertheless now move to compel answers to their irrelevant questions concerning Ms. Erwin's privileged communications with counsel.

Q When you were sitting in that courtroom, at the end of the hearing, did you have an opinion, yes or no, as to whether or not the Department of Justice was making a misrepresentation to the Court on any subject? Id. at 295-96.

Argument

I. Plaintiffs' Motion To Compel Privileged Communications Should Be Denied.

A. The Testimony Plaintiffs Seek To Compel Is Protected By The Attorney-Client Privilege.

The attorney-client privilege protects communications between client and attorney. The privilege applies if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984).

The assertion of privilege in this case unquestionably meets all of the elements of the attorney-client privilege: (1) Ms. Erwin's deposition was sought in her capacity as Acting Special Trustee, i.e., as a government official and thus the client of Government counsel. In the context of the federal government, the agency is the client and the Department of Justice or agency counsel is the attorney. Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997); United States v. Edelin, 128 F. Supp. 2d. 23, 40 (D.D.C. 2001). (2) Government Counsel, with whom Ms. Erwin had communicated regarding her obligation to appear at the deposition as noticed, is a member of the bar and was acting as a lawyer when Ms. Erwin communicated with him. (3) Ms. Erwin communicated with Government Counsel in her official capacity for the purpose of obtaining his legal advice, legal services, and assistance with

respect to the ultimate determination of whether she would be required to appear for the deposition as noticed. Dec. 17 Hearing Tr. at 6-9. (4) The United States, through counsel, claimed the privilege and has not waived it. Erwin Dep. Tr. at 283-86, 291, 294-96.

Plaintiffs' deposition questions would require Ms. Erwin to reveal her communications to Government counsel concerning her obligations vis-a-vis the deposition notice. Plaintiffs' counsel asked, in various ways, for Ms. Erwin to disclose whether the facts recited by Government counsel in court were accurate. Erwin Dep. Tr. at 283-84, 286, 291, 294-95, 295-96. Those questions were a back-door way of requiring Ms. Erwin to reveal what she had communicated to counsel. Forcing Ms. Erwin to testify that the statements made by Government counsel were "in her opinion" accurate or inaccurate would be compelling her to reveal what she had told her attorney and thus would violate the privilege. Plaintiffs should not be permitted to violate the privilege in this manner. Courts have refused to compel discovery in analogous circumstances where the discovery sought would reveal attorney-client communications. See, e.g., In re Sealed Case, 737 F.2d at 99 (communication was protected where it would reveal the content of the confidential client communications the privilege was created to encourage); Alexander v. FBI, 186 F.R.D. 21, 47 (D.D.C. 1998) (deposition questions inquiring as to what deponent did with her counsel in order to prepare for deposition sought information protected by attorney-client privilege); Boyer v. Bd. of County Comm'rs, 162 F.R.D. 687, 690 (D. Kan. 1995) (deposition inquiry concerning communications between county's attorney and county employee was precluded by attorney-client privilege); Nakajima v. General Motors Corp., 857 F. Supp. 100, 105 n.11 (D.D.C. 1994) (any communications between client and his counsel in preparation for a

deposition were protected by the attorney-client privilege and not discoverable); see also Paul R. Rice, Attorney-Client Privilege the United States, § 5:1, at 8-9 (2d ed. 1999) ("Neither the client nor the attorney may be required to reveal, directly (through testimony or responses to discovery demands) or indirectly (through the disclosure of the attorney's responsive communications or the attorney's notes), what the client said or communicated to the attorney or to the attorney's agent.")

Plaintiffs argue that they are merely seeking to compel Ms. Erwin's testimony regarding underlying facts and that such facts are not protected by the attorney-client privilege. Plaintiffs' Motion at 9-11. While it is true that the attorney-client privilege only protects communications and does not protect underlying facts, that is not what Plaintiffs are seeking to compel here. Rather, they have sought to uncover the actual communications between Ms. Erwin and Government counsel. This attempt to invade the privilege should be rejected. "The privilege serves the important public policy of facilitating free discussions between a client and attorney, and should not be lightly disregarded." Finley Assoc., Inc. v. Sea & Pines Consol. Corp., 714 F. Supp. 110, 117 (D. Del. 1989).

Plaintiffs cite no authority that supports the type of back-door invasion of privileged communications they are attempting here. Plaintiffs do cite authority in support of the proposition that underlying facts are not privileged; however, those cases are inapposite here because the "facts" Plaintiffs are seeking are the very substance of the communications between Ms. Erwin and

Government counsel.[3] The assertion of privilege here is to protect Ms. Erwin's communications with counsel as opposed to underlying facts.[4]

C. Ms. Erwin's Communications With Counsel Are Privileged Under The Court's December 23, 2002 Memorandum and Order

Plaintiffs, citing the Court's December 23, 2002 Memorandum and Order, also assert that "trustee-delegates may assert no attorney client privilege vis-a-vis 500,000 individual Indian trust beneficiaries." Plaintiffs' Motion at 9. However, Plaintiffs' interpretation of the Court's December 23, 2002 Order conveniently ignores the express language of the Court's accompanying Memorandum which states, "The Court will, consistent with logic and prevailing authority, recognize the existence of an attorney-client privilege where a trustee seeks legal advice solely in his own personal interest or where the discovery material has been shown to relate exclusively to non-fiduciary matters." Dec. 23, 2002 Memorandum and Order at 10. Discovery as to Ms. Erwin's communications with counsel concerning her appearance at a noticed deposition for the litigation is, on its face, a non-fiduciary matter

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[3] For example, Plaintiffs cite Upjohn v. United States, 449 U.S. 383, 395-96 (1981), in which the Court held that the attorney client privilege prevented the Government from obtaining a corporation's attorneys' notes, but not from questioning employees concerning the underlying facts. Plaintiffs' Motion at 10. That case is inapposite to the circumstances here.

[4] Plaintiffs also argue that Government counsel impermissibly objected on the grounds that Mr. Brown was harassing the witness. Plaintiffs' Motion at 11, n.2. However, Rule 30(c) states that, "All objections made at the time of the examination . . . to the conduct of any party . . . shall be noted by the officer upon the record of the deposition." Since Mr. Brown was harassing the witness and causing her to become visibly upset, Erwin Dep. Tr. at 296, by repeatedly asking her the same question about a privileged matter – at the end of the agreed time for the deposition when the witness had to catch a plane – Government counsel properly noted such behavior on the record. See also Red. R. Civ. P. 30(d)(1), 30(d)(4).

that relates solely to litigation. Although Interior Defendants respectfully disagree with certain aspects of the Court's December 23, 2002 Order, that Order does not eliminate the availability of the privilege asserted in these circumstances.

D. The Crime/Fraud Exception Does Not Apply

Plaintiffs claim in a footnote, and apparently in the alternative, that even if the testimony they seek to compel is privileged, the question should still be answered, based on the crime/fraud exception to the attorney-client privilege. Plaintiffs' Motion at 14 n.3. Plaintiffs have not met their burden of establishing that the crime/fraud exception should apply. For this exception to apply, Plaintiffs must establish that the client participated in a crime or fraud, and consulted with an attorney for the purpose of furthering the crime or fraud. Alexander v. FBI, 198 F.R.D. 306, 310 (D.D.C. 2000). The party seeking to demonstrate the applicability of the crime/fraud exception must offer evidence of "an ongoing or imminent crime or fraud," and that the client consulted with his attorney for that purpose. Id. "[T]he party seeking to overcome the privilege [has] the burden of showing that the crime-fraud exception applie[s]." In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997). To meet this burden, the party opposing the privilege must establish a *prima facie* case consisting of "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985). A bare allegation of wrongdoing is insufficient. In re ML-Lee Acquisition Fund II, L.P., 848 F. Supp. 527, 565 (D. Del. 1994).

Plaintiffs have failed to make the *prima facie* showing necessary to dispense with the attorney-client privilege under the crime/fraud exception. Plaintiffs would have the Court assume that either Ms.

Erwin or Government counsel committed fraud, apparently failing to consider a good faith explanation for the confusion over whether Ms. Erwin planned to travel to Washington, D.C. Consistent with Government counsel's argument at the December 17 hearing, the situation is readily explained as "[a]t the very most . . . an unintentional, inadvertent misunderstanding" between what Ms. Erwin intended to convey regarding her availability and what was actually conveyed at the December 13 hearing. Dec. 17 Hearing Tr. at 5. In any event, Plaintiffs have failed to present a *prima facie* case of fraud.[5]

E. The Testimony Plaintiffs Seek To Compel Is Neither Relevant Nor Reasonably Calculated To Lead To The Discovery Of Admissible Evidence In Trial Phase 1.5, Which Governs The Scope Of Discovery.

This Court should not even reach the issue of whether the testimony Plaintiffs are seeking to elicit from Ms. Erwin contains privileged communications because Plaintiffs have no legitimate need to compel testimony concerning the scheduling of Ms. Erwin's deposition, which has already occurred. While relevancy was not the specific basis asserted by Government counsel during the deposition, Plaintiffs should not be able to compel testimony that is neither relevant nor reasonably calculated to lead the discovery of admissible evidence and hence, not within the scope of Rule 26(b)(1). Although the scope of permissible discovery is broad, "it is not so liberal as to allow a party to 'roam in shadow zones of relevancy and to explore [a] matter which does not presently appear germane on the theory

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[5] Ms. Erwin explained at the December 17 hearing that she made her reservations but then put her plans on hold pending the scheduling of her deposition. Dec. 17 Hearing Tr. at 15. Neither Ms. Erwin's contingent plans to travel to Washington, D.C., nor the unfortunate fact that both Government counsel were unaware of them, constitutes deception or fraud upon the Court. Plaintiffs' choice to ignore Ms. Erwin's explanation does not convert it into deception, much less fraud.

that it might conceivably become so.'" In re Fontaine, 402 F. Supp. 1219, 1221, (E.D.N.Y. 1975) (internal citations omitted).

The scope of Ms. Erwin's deposition was properly limited to the January 6 Plans, as indicated by Plaintiffs' representations concerning the same. Inquiries into communications between Ms. Erwin and Government counsel concerning Ms. Erwin's schedule have no bearing on the plans, trust reform, or this case. Plaintiffs specifically represented to the Court during the December 13 hearing that the purpose of Ms. Erwin's and Mr. Edwards' depositions was to assist them in preparing their plan in anticipation of the Court's January 6, 2003 deadline. Dec. 13 Hearing Tr. at 11. Plaintiffs' counsel made similar representations in a discovery conference with the Special Master-Monitor. See Report and Recommendation of the Special Master-Monitor of Dec. 12, 2002 at 4. Moreover, at the beginning of Ms. Erwin's deposition, Government counsel reminded Plaintiffs' counsel that the deposition had been ordered based on such representations to the Court. Erwin Dep. Tr. at 6-7. Even if, as Plaintiffs now contend, the scope of the depositions was not so limited, it certainly must be limited to matters to be decided in Trial 1.5, which do not include Ms. Erwin's scheduling issues.

Plaintiffs claim in their Motion that questions concerning the scheduling of Ms. Erwin's deposition are relevant because they go "directly to issues of continuing fraud on the court and the absence of integrity of Ms. Erwin, the acting special trustee and a prime architect of defendants' January 6, 2003 Plan." Plaintiffs' Motion at 9. That proffer of relevancy is insufficient for at least two reasons: First, Plaintiffs do not have a mandate to expand the scope of discovery based on their unilateral view that there is or has been a continuing fraud on the Court. The deposition was for discovery related to

preparation of the January 6 Plans. Second, Plaintiffs have not come close to alleging the elements for fraud on the Court. "Fraud on the court" requires a showing of intent to deceive or intent to defraud the court. United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002) ("[T]here must be a showing of conscious wrongdoing – what can be characterized as a deliberate scheme to defraud – before relief from a final judgment is appropriate[.]") (citations omitted).

II. Plaintiffs' Request For Sanctions Must Be Rejected Because The Assertion Of Privilege Was Substantially Justified

In adjudicating discovery disputes, sanctions are not appropriate if the losing party was "substantially justified" in advancing its position. FED. R. CIV. P. 37(a)(4)(A). "Substantially justified" generally means that there is no clear answer to the particular issue in dispute and that opposing viewpoints may therefore be defensible. As this Court has observed, "a party meets the 'substantially justified' standard when there is a 'genuine dispute' or if 'reasonable people could differ' as to the appropriateness of the motion." Alexander v. FBI, 186 F.R.D. 144, 147 (D.D.C. 1999) (citing Pierce v. Underwood, 487 U.S. 552 (1988)). "If there is an absence of controlling authority, and the issue presented is one not free from doubt and could engender a responsible difference of opinion among conscientious, diligent but reasonable advocates, then the opposing positions taken by them are substantially justified." Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 200, 205 (D.D.C. 1998) (citations omitted).

> If the [issue] raises a genuine issue among reasonable lawyers, the losing position is found to be substantially justified. . . .Speaking more practically, when there is no controlling precedent on the issue, and counsel marshals what authority there is in

support of her position, the position she articulates will be found to be substantially justified even if it does not prevail.

Boca Investerings P'ship v. United States, No. 97-602PLF/JMF, 1998 WL 647214, at *1 (D.D.C. Sept. 1, 1998), overruled on other grounds, ___ F.3d ___, No. 01-5429 (D.D.C. Jan. 10, 2003), U.S. Court of Appeals for the D.C. Circuit Opinions, Most Recently Released Opinions (visited Jan. 15, 2003) <http://pacer.cadc.uscourts.gov/docs/ common/opinions/200301/01-5429a.txt> (internal citations omitted).

Interior Defendants' assertion of privilege was legally correct, but even it were, after the fact, found not to be, it still would be substantially justified. As set forth in section I, supra, the attorney client privilege protects against both direct and indirect attempts to discover privileged communications. Here, Plaintiffs did not seek to compel mere facts, but asked questions that would have caused Ms. Erwin to reveal communications with her attorneys. Government counsel was not only substantially justified, but obligated to assert privilege to protect those communications on behalf of her client. Regardless of what the Court ultimately rules, a reasonable argument existed that the answer to those questions would violate the attorney-client privilege. Plaintiffs, on the other hand, cite no legal authority to the contrary and cite only cases standing for the general proposition that underlying facts are not privileged. Plaintiffs cite no cases condoning their back-door approach to invasion of privilege.

Aside from the actual questions asked, the totality of the circumstances strongly indicates that the assertion of privilege was substantially justified. See Gregory P. Joseph, Sanctions: The Law of Federal Litigation Abuse § 48(E) at 595 (3d ed. 2000) ("Whether a party's failure to disclose was

substantially justified is a fact question to be decided on the totality of the circumstances."). No evidence supports Plaintiffs' allegations that privilege was asserted in bad faith. See Hinton v. Patnaude, 162 F.R.D. 435, 439 (N.D.N.Y. 1995) (lack of evidence of bad faith by party failing to disclose was factor in finding that it was substantially justified). There was no bad faith attempt to foreclose a line of questioning. To the contrary, Government counsel initially allowed Ms. Erwin to answer the purely factual questions, then conferred with Ms. Erwin and allowed her to answer two more factual questions, until Plaintiffs' attorney started asking Ms. Erwin to reveal privileged communications. Erwin Dep. Tr. at 283-284. Plaintiffs' counsel sprang these questions on the witness toward the very end of the deposition, which they had previously represented as being limited to discovery on the January 6 Plans. Government counsel only briefly conferred with Ms. Erwin and, after doing so, was accused of "coaching" her.[6] Erwin Dep. Tr. at 293. Moreover, with his questions, Plaintiffs' counsel went well beyond the scope of discovery related to plan preparation. See Section I.E, supra. Finally, to the extent the Court's December 23, 2002 Order controls this assertion of privilege, the Order had not yet been issued.

Plaintiffs also request that any sanctions awarded against the Government be paid by the witness and Government counsel. Plaintiffs' Motion at 12-16. Plaintiffs have asserted no basis to impose personal sanctions on a government attorney and government official based on the assertion of

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[6] Although Plaintiffs' counsel accused Government counsel of "coaching" Ms. Erwin, it was perfectly proper for Ms. Erwin to consult with Government Counsel to determine whether she could respond consistent with the privilege. The very brief consultation did not cause any material dely in the deposition, particularly since Plaintiffs apparently had already concluded their questioning regarding the January 6 Plans.

attorney-client privilege. These circumstances come nowhere near the type of conduct that could justify imposing personal sanctions. See United States v. Shaffer Equip. Co., 158 F.R.D. 80, 86, 87, 88 (S.D.W.Va. 1994) (award of personal sanctions appropriate where government attorneys knew of perjury by government witness but did not disclose it); Chilcutt v. United States., 4 F.3d 1313, 1322-24 (5th Cir. 1993) cert. denied, 513 U.S. 979 (1994) (award of personal sanctions under Rule 37 against government attorney where court had previously personally sanctioned government attorney for similar misconduct, and where government attorney "not only intentionally withheld documents that [he] knew existed, but . . . also knowingly made blatant misrepresentations to the district court about the existence of those documents").

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion To Compel Testimony and Request For Sanctions should be denied.

Respectfully submitted,

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Dated: January 15, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before the Court on Plaintiffs' "Motion To Compel Testimony Of Donna Erwin Who Was Impermissibly Directed By Defendants' Counsel Not To Answer Questions On the Basis Of Attorney Client Privilege And Harassment And Request For Sanctions Pursuant To Rule 37(4)(A) [sic] And Memorandum Of Points And Authorities In Support of Said Motion" filed January 1, 2003. Upon consideration of this Motion and Request for Sanctions and Defendants' responses thereto, it is HEREBY:

ORDERED that Plaintiffs' Motion To Compel Testimony is DENIED. It is further

ORDERED that Plaintiffs' request for sanctions pursuant to Rule 37(a)(4)(A) is DENIED. It is further

ORDERED that Plaintiffs' request that Sandra Spooner and Donna Erwin personally shall pay

attorneys' fees and all costs associated with the depositions of Ms. Erwin is DENIED.

SO ORDERED this _____ day of _____, 2003.

_____

ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 15, 2003 I served the foregoing *Interior Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion to Compel Testimony of Donna Erwin* by facsimile in accordance with their written request of October 31, 2001 upon:

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